(3)

No. 91-398

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

FIRST SOUTHERN INSURANCE COMPANY,
Petitioner,

v.

BRENDA MASSEY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITIONER'S REPLY BRIEF

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ARGUMENTS FIRST RAISED IN THE BRIEF IN OPPOSITION

Respondent Massey sets forth five arguments in support of her "reasons for denying the writ." They are as follows:

I. The issue presented by the petition is not an important question of federal law.

II. Procedural due process does not apply to the case at bar.

III. Petitioner did not preserve below its constitutional argument.

IV. Georgia law prohibits a summons which would afford due process.

V. Other factors cure the absence of due process in the case at bar.

The foregoing correspond to Sections I-V of respondent's "reasons for denying the writ" set forth in her brief in opposition. Petitioner will reply to each of these contentions in the order presented by respondent.

REPLY TO ARGUMENTS FIRST RAISED IN THE BRIEF IN OPPOSITION

I.

Respondent contends that the jurisdictional requirements for certiorari have not been met because this case does not present "an important question of federal law which has not been, but should be, settled by this Court." (Opposition, p. 6). Respondent nowhere cites a previous decision of this Court settling the issue presented by the petition. It must therefore be presumed that respondent's initial argument for denying the writ is that the issue presented is an *unimportant* question of federal law, or that for some reason the issue should not be settled by the Supreme Court.

The issue presented by the petition is whether the due process requirements of the United States Constitution and *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 E.Ld. 865 (1950) are satisfied by notice of the pendency of legal action *against a different person. Mullane* clearly requires notice which would apprise interested parties of the pendency of the action. The question presented by this petition is *what action?* The Court in *Mullane* did not contemplate merely notification of *any* legal action. Obviously, this Court in *Mullane* assumed that its dicta about the content of due

process notice would be read to mean that the notice to a recipient would include a description or identification of proposed legal action *against the recipient, not an unrelated bystander.*

Nowhere in the opposition to this petition does the respondent challenge the elementary and profound importance of this constitutional idea. The respondent argues strenuously that due process has been waived, or that due process does not apply, or that the lack of due process has been cured by other events. But nowhere does the respondent deny the accuracy of the constitutional basis for this petition.

The constitutional issue is extremely important. This Court has discussed only once, in dicta, the constitutionally sufficient content of due process notification, *Mullane*, 339 U.S. at 314, 70 S.Ct. at 657, and only once more when speaking to the requirement of "an opportunity to present . . . objections." *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978).

The importance of the constitutional issue is plain. If persons or organizations pressing claims are allowed to achieve default judgments merely on the basis that a person was notified of legal action proposed against another, abuses of sharp practice and manifold unfairness will follow. Will a courtesy copy to an employer of a lawsuit served upon its employee automatically require the employer to file an answer? Will a copy of a summons and complaint served on the United States, describing an action against a defense contractor, automatically require the United States to file an answer?

In its very simplest terms, the constitutional question is what did this Court mean when it referred to "the action" in *Mullane*? *Mullane*, 339 U.S. at 314, 70 S.Ct. at 657. Is notification of legal action proposed against a complete stranger sufficient? Is notification of legal action

against an alleged co-defendant or an alleged agent sufficient due process to support a default judgment against the recipient? Petitioner respectfully submits that "the action" referred to by this Court in *Mullane* is the action contemplated *against the recipient of the due process notification.* Otherwise, the procedural due process requirements of the United States Constitution will become a hollow protection, nothing more than a contest to determine how vague and imprecise a notice can be while still satisfying the Constitution.

Respondent asserts that the constitutional issue presented is not an important federal question, but offers no explanation for why it is not.

II.

Respondent asserts that "there is simply no due process question to be decided." (Opposition, p. 8). The argument presented here by respondent is incorrect for three reasons.

First, respondent argues that there was never a judgment against First Southern until the litigation in the district court below. Respondent argues that the state court litigation which preceded this declaratory judgment action resulted in no default judgment "against" First Southern, and therefore no necessity existed for due process in that proceeding. Respondent is correct that the judgment in the state court did not name First Southern as a judgment debtor. However, respondent's entire claim against First Southern is based on her assertion that the state court litigation resulted in an irrevocable resolution of negligence and damages issues which is binding and final against First Southern. The state court judgment was therefore clearly one "against" First Southern although First Southern was not named as a judgment debtor. This argument by respondent ignores the substance of the state court judgment and her own arguments before the district court. Respondent presented the

state court judgment as evidence to the district court and relied upon the state court judgment as a basis for her recovery on counterclaim. It was therefore undeniably a default judgment *against* First Southern.

Second, respondent argues, without any authority for support, that "it is clear beyond question that the Constitution of the United States does not require service of a summons upon a party to a contract in order to invoke that party's contractual liability under that contract." (Opposition, p. 5). Notwithstanding the fact that respondent Massey was *not* a party to the insurance contract, the constitutional proposition which respondent states is "clear beyond question" is clearly wrong. Although respondent was not a party to the contract, she could "invoke" her alleged rights as a third-party beneficiary by making a telephone call or writing a letter. However, where a party or third-party beneficiary to a contract seeks to enlist the jurisdiction and power of the courts to *enforce* a contract, the United States Constitution *does* require due process. *See, e.g., Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812, 105 S.Ct. 2965, 2974, 86 L.Ed.2d 628 (1985).[1] The argument presented by respondent here is simply wrong.

Third, respondent repeatedly asserts that there is no due process issue in this case, but the district court and the circuit court disagreed. The circuit court affirmed the decision of the district court which was *expressly based upon application of due process principles.* The district court did not find that respondent Massey was exempt from procedural due process, or that procedural due

[1] Incidentally, dicta in *Shutts* offers a significant step from *Mullane* in the direction urged by petitioner. In *Shutts*, this Court stated that "[t]he notice should describe the action *and the . . . [persons] . . . rights in it.*" *Shutts*, 472 U.S. at 812, 105 S.Ct. at 2974, 86 L.Ed.2d 628. Without a summons to First Southern warning that its rights in property, as well as Ms. Almy's, might be affected, there could be no description of First Southern's "rights in the action."

process did not apply to this case. Instead, the district court concluded ". . . that the documents served upon First Southern . . . were sufficient to meet the requirements . . . of due process under both the United States Constitution and the Constitution of the State of Georgia." (Appendix "B," p. 3a). The district court was referring specifically to the alleged summons in the state court litigation. The district court therefore believed that principles of procedural due process applied, and concluded that notification to First Southern of legal action proposed against a different person constituted procedural due process. Respondent is the only person contending that she is somehow exempt from the requirements of constitutional due process.

III.

Respondent paradoxically asserts that the constitutional issue here was not preserved by petitioner below, yet provides a precise and direct quotation from petitioner's trial brief in the district court which logically and completely presents the constitutional argument. The quotation in the opposition brief to this Court speaks for itself. The constitutional issue was presented to the trial court and preserved for review by this Court on certiorari. (Opposition, p. 9). The district court apparently agreed that the constitutional issue was properly and sufficiently raised: it addressed the constitutional issue in its memorandum opinion and order of September 13, 1990. (Appendix "B," p. 3a).

Respondent also argues that "not a single case was cited" below by the petitioner. A significant portion of the petition for certiorari discussed the paucity of authority on this issue generally, and the complete lack of authority on the specific issue presented. (Petition, pp. 8-11). A review of the trial court brief, circuit court brief, and petition for writ of certiorari will reveal that petitioner has made a continuing and conscientious effort to develop the due process issue and bring all possible deci-

sional authority to the attention of the courts. The due process issue has not been waived at any juncture by petitioner.

IV.

Respondent next argues that Georgia law precludes the issuance of a summons which would warn the uninsured motorist insurer of the pendency of legal action against the insurer. At the outset, petitioner notes that reliance on state statutes and decisional law is not responsive to matters of constitutional due process. If the state law relied upon by respondent requires an unconstitutional result, it is not persuasive authority to this Court. It is simply unconstitutional.

It is only the respondent's interpretation of Georgia law which "precludes" the issuance of a summons accurately and fairly describing the contemplated legal action. Respondent argues that O.C.G.A. § 33-7-11 allows First Southern the *option* of filing an answer and that the filing of an answer is not required. Putting aside the fact that the statute nowhere states that this is an option (Appendix F, pp. 16a-24a), respondent's observation could be made about *any* civil action. Respondent readily admits (indeed relies upon) the proposition that the "option" to file no answer results in a binding default determination against an uninsured motorist insurer on issues of negligence and damages. *Any* litigant may refrain from filing an answer and suffer default, regardless of whether the case arises from the Georgia Uninsured Motorist Act. There is no explanation by respondent of why this "option" somehow precludes the service of a constitutionally sound summons.

Respondent also asserts that the case of *State Farm Mutual Automobile Ins. Co. v. Brown*, 114 Ga. App. 650, 152 S.E.2d 641 (1966) precludes due process notice to the uninsured motorist insurer. Respondent's interpretation of *Brown* is incorrect. The sole issue in *Brown*

was the elimination of reference to the uninsured motorist insurer in the complaint itself. The discussion by the court in *Brown* about the content of the summons was dicta. *Brown*, 114 Ga. App. at 656, 152 S.E.2d at 645.

More importantly, *Brown* was decided before the 1967 amendments to the Georgia Uninsured Motorist Act. Prior to 1967, the uninsured motorist carrier could not file pleadings in its own name, *and could not legally suffer a default judgment on any issues. Compare Brown* and *United Services Automobile Association v. Logue*, 117 Ga. App. 717, 162 S.E.2d 12 (1968) *with Doe v. Moss*, 120 Ga. App. 762, 172 S.E.2d 821 (1969). In *Brown*, there was no concern about procedural due process because the decision to file no answer could not result in a default judgment against the uninsured motorist insurer on any issues.

Respondent's interpretations of the Georgia statute and *Brown* are incorrect. Even if they were correct, they would be unconstitutional and nonresponsive to the argument presented by petitioner based on the absence of procedural due process.

V.

Respondent presents in the final section of her brief a variety of additional contentions why the writ should be denied.

Respondent contends that the burden rested upon First Southern to present evidence that the lack of due process notification caused actual confusion about whether legal action was pending against First Southern. Respondent offers no authority for this proposition. Indeed, this theory would open the door to evidentiary hearings which would be used to "cure" blatantly deficient notice. This Court has already ruled that the sophistication of a party is irrelevant to whether notice is sufficient under due process. *Mennonite Bd. of Missions v. Adams*, 462 U.S.

791, 800, 103 S.Ct. 2706, 2712, 77 L.Ed.2d 180 (1983). Notice must *objectively* satisfy the requirements of due process. An *ex post facto* factual inquiry into whether the lack of due process made any difference cannot be allowed to substitute for objectively sufficient notification.

Respondent also argues that First Southern, "having elected to do business in Georgia," somehow waived its right to procedural due process under the Constitution. Respondent presents no authority for this proposition, and cites no law in Georgia stating such a waiver.

Respondent implies that the contract of insurance included a waiver of due proces. Respondent has presented no evidence from the written contract or otherwise which shows any contractual waiver of constitutional due process.

CONCLUSION

After all of the fallacious arguments by respondent "that there is simply no due process question" are stripped away, the essence of respondent's opposition is that the constitutional issue presented is not an important one, and therefore does not satisfy the jurisdictional requirements of this Court.

The district court apparently agreed that a due process issue was presented and ruled on it.

Respondent offers *no argument whatsoever* disputing petitioner's interpretation of this Court's prior decisions in *Mullane* and *Memphis Light*. Indeed, the only argument which can be raised by respondent is that this Court in *Mullane*, when it required notice of "the action," meant that notice of some action other than the one intended against the recipient would be sufficient. A basic and important principal of procedural due process should be notice of "the action" which is proposed against the recipient of the notice, not notice of legal action against some other party. Any other interpretation of *Mullane* would

reduce procedural due process from a basic principle of constitutional law to a game played by lawyers. The issue presented is therefore one of sufficient importance to invoke this Court's jurisdiction on writ of certiorari.

Respectfully submitted,

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